

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 7, 2004 Session

**ANGELA KAMILLE DRAPER as parent, survivor and next friend of
BRYANNA FAITH DRAPER, deceased, v. LARRY WESTERFIELD, M.D.,
et al.**

**Direct Appeal from the Circuit Court for Sullivan County
No. C34189(M) Hon. John S. McLellan, III., Circuit Judge**

No. E2003-02381-COA-R3-CV - FILED JULY 29, 2004

Plaintiff alleged defendant violated his professional and statutory duty (T.C.A. § 37-1-403) by failing to properly report child abuse of her deceased daughter. The Trial Court granted summary judgment to defendant on grounds defendant did not treat decedent and was immune from liability under the statute. We affirm in part and vacate in part.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Vacated in Part,
Affirmed in Part, and remanded.**

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Paul R. Wohlford and Kenneth D. Hale, Bristol, Tennessee, for Appellant.

Richard M. Currie, Jr., and Andrew T. Wampler, Kingsport, Tennessee, for Appellee, Larry H. Westerfield, M.D.

OPINION

The Trial Court granted defendant, Dr. Larry Westerfield, summary judgment, stating that it was a final judgment as to Dr. Westerfield, and there was no reason to delay an appeal. Plaintiff appealed.

BACKGROUND

This action was filed by Angela Draper, as parent and next friend of Bryanna Faith Draper, a three-month old infant who died on June 2, 2000, after being abused by her father. Plaintiff filed suit against Blue Ridge Radiology Associates and several doctors employed by Blue Ridge, including Dr. Larry Westerfield. Plaintiff alleged that Bryanna had been admitted to the hospital in May 2000, and that x-rays were taken which showed numerous injuries, but the defendant radiologists employed by Blue Ridge who read the x-rays failed to report the injuries. Plaintiff alleged that on May 16, 2000, defendant Westerfield represented to law enforcement authorities that an x-ray taken on May 12 should have been read as abnormal, but that the abnormality was not of great concern, and inferred that it did not indicate abuse. Plaintiff alleged that Westerfield did not file an addendum to the report noting the presence of an abnormality until June 5, three days after Bryanna's death, and plaintiff concluded that Westerfield violated the applicable standard of care.

Blue Ridge and defendant radiologists in their Answer, essentially denied the allegations contained in the Complaint. Westerfield filed interrogatory answers, and averred that plaintiff, the child's mother, a registered nurse, knew that the child had bone fractures, bruising, etc., which was recorded in the hospital records, and which should have indicated that the child was being abused. He also asserted that he told plaintiff before the child's death that he was of the opinion that Bryanna had been abused and that the parents were the most likely abusers. Westerfield also claimed that on May 16, 2000, he told Diane Stanley with the Department of Children's Services and Louie Elias with the Sullivan County Sheriff's Department, both of whom were investigating Bryanna's case, that he thought the child had been abused and that the parents were the most likely abusers. He also stated that plaintiff and her husband came to his office on May 19, 2000, without an appointment, closed his office door, and asked him what he told Detective Elias on May 16. He said he told them that he told Detective Elias that he thought Bryanna had been abused and that he suspected the parents.

Westerfield asserted that he prepared an addendum to the radiology report at the request of Dr. Nicole Miller after Bryanna's death, because Dr. Miller feared that the brain might not be looked at during the autopsy unless there was an indication that it needed to be.

SUMMARY JUDGMENT

Westerfield's Motion for Summary Judgment asserted that he could not be held liable for medical malpractice under Tenn. Code Ann. § 29-26-115 because he was not Bryanna's physician, and because he exercised the appropriate degree of skill and care required. He also asserted that he was immune from liability pursuant to Tenn. Code Ann. § 37-1-410 because his alleged wrongful conduct took place while he was participating in a child abuse investigation.

Westerfield's Affidavit stated that he practiced medicine in Kingsport, and that his specialty was diagnostic radiology. He stated that he was familiar with the acceptable standard of care for the practice of radiology in his community, and that he acted in accordance with that

standard at all times. He stated that on May 13, 2000, he interpreted an upper GI series of x-rays on Bryanna, and found no abnormality. He was not aware of any suspicion of child abuse at that time. He stated that this was the only activity he performed as Bryanna's physician.

Westerfield further stated that on May 16, 2000, Detective Louie Elias of the Sullivan County Sheriff's Department and Diane Stanley of DCS came to the hospital where he was working and asked for a radiologist to review Bryanna's x-rays and CT scan, as part of an investigation they were conducting. He stated that he was available at that time, and reviewed Bryanna's x-rays and CT scan in order to assist with the investigation. He reiterated that he never examined the child, and did not make a charge for his review or his conversation with the investigators. He stated that he told the investigators that the records showed abnormalities, and the fractures suggested child abuse, most likely by the parents. He stated that when he reviewed the CT scan of the brain he noted "what appears to be a small bifrontal subdural fluid collection or hygroma. This finding would be slightly unusual for a young infant of three months of age. Her cranial structures are perhaps just minimally widened. I do not see any acute blood in either cerebral hemisphere." He stated that he had indicated to the investigators that the hygroma was a sign of possible abuse, and that the investigators "suggested" that the arm fracture and clavicle fracture could be due to mishandling by the hospital staff, which he told them he did not believe to be true. He concluded by saying this was the extent of his involvement in the investigation.

Westerfield stated that when he reviewed these records on May 16, 2000, he was not providing treatment nor reviewing the child's records for the purpose of treatment. He reviewed the records only because the investigators asked him to do so and give them an opinion, and he acted in good faith, and rendered his opinion that the records showed possible abuse.

Westerfield stated that after Bryanna died, he dictated an addendum to the radiology report on the CT scan which contained his opinion, at the request of Bryanna's pediatrician and the detective. He said that at all times, he read and interpreted Bryanna's records in a manner consistent with the applicable standard of care.

In response to the Motion, plaintiff attached excerpts from the deposition of Diane Stanley, the DCS worker, who stated that Westerfield never told her he suspected child abuse, and that if he had done so, she would have removed the child from the home. She testified that the only abnormality which Westerfield mentioned was the bleeding shown in the CT scan.

Stanley further testified that their meeting with Westerfield was by way of a specific appointment set up by Anita Stapleton in advance. Stanley testified that Westerfield gave her nothing to go on as far as getting the child removed from the home, and even stated that the abnormality in the CT scan was no cause for concern, and that the child's other injuries could have happened in the hospital, or could have been done by the child herself.

Plaintiff also filed the Affidavit of Ronald L. Washburn, M.D. Dr. Washburn stated that he was a board certified radiologist, who practiced in Virginia, and that he was familiar with the

standard of care for Kingsport, Tennessee, the tri-cities area, and similar communities. He stated that it was his opinion that Westerfield was performing medical services for the child when he reviewed her x-rays on May 16 at the request of DCS and/or the sheriff's department, because he was required to use his medical skill/training, and because he was commenting on studies performed by other members of his practice group. Dr. Washburn further stated that Westerfield breached the applicable standard of care because he failed to prepare a contemporaneous report which detailed his finding that child abuse was possible, and because he failed to timely communicate his finding to the child's medical providers.

The Trial Court, in granting Summary Judgment, found that the plaintiff's allegations of malpractice against Westerfield stemmed solely from his actions on May 16, 2000, when he reviewed Bryanna's records at the request of DCS and the sheriff's department, and that no doctor/patient relationship existed between Westerfield and Bryanna as a result of his actions on that day.

Plaintiff also raised a negligence issue, but the Trial Court found that Westerfield was immune from liability pursuant to Tenn. Code Ann. § 37-1-410 since he communicated information to the investigators, and there was no dispute that he acted in good faith. The Court further held that the statute did not require Westerfield to report the allegations accurately or to report to the child's primary care provider. The Court thus found that there were no genuine issues as to any material facts, and that Westerfield was entitled to summary judgment as a matter of law.

ISSUES ON APPEAL

1. Whether the Trial Court possessed subject matter jurisdiction over the cause of action asserted under Tenn. Code Ann. § 37-1-401?
2. Whether the Trial Court properly found Westerfield to be immune from liability pursuant to Tenn. Code Ann. § 37-1-401 *et seq.* for his good faith participation in the child abuse investigation?
3. Whether the Trial Court properly found that there was no doctor-patient relationship between Westerfield and Bryanna when he reviewed the records in connection with the child abuse investigation?

Westerfield argues that the Trial Court lacked subject matter jurisdiction over the claims brought pursuant to Tenn. Code Ann. § 37-1-401 *et seq.*, because the statute does not create a private right of action.

In the case of *Ham v. Hospital of Morristown, Inc.*, 917 F. Supp. 531 (E. D. Tenn. 1995), the District Court analyzed and applied Tennessee law in deciding that Tenn. Code Ann. § 37-1-401 *et seq.* does give rise to a claim of negligence for the failure of a physician to report suspected abuse. The Court reasoned the statute created a duty which could be breached, and relied

upon the *Doe v. Coffee County Bd. of Educ.* case previously decided by this Court, in holding that the breach of that duty which caused harm could bring about civil liability. *Id.*; see *Doe*, 852 S.W.2d 899 (Tenn. Ct. App. 1992). While *Doe* dealt with the alleged failure of a teacher to report suspected child sexual abuse, *Ham* dealt with a factual scenario similar to this case. The child was seen at the hospital and had suspicious injuries, but was released to go home with her mother and later suffered devastating injuries at the hands of the mother's boyfriend. *Ham*, at 531. The Court held that a failure to report suspected child abuse could result in civil liability, because the statute created a duty to report which was breached. *Id.*

While no Tennessee authorities have been cited on this issue, we find the District Court's Opinion persuasive and its reasoning sound. We hold that allowing a negligence action to be brought for the failure to report abuse also advances the public policy expressed in the statute protecting children, a class singled out by the General Assembly vis a vis the public at large, by requiring reporting, and providing "the greatest possible protection as promptly as possible for children." Tenn. Code Ann. § 37-1-402.

Moreover, there can be no question that the statute creates a duty to report suspected child abuse, and as the Supreme Court has explained:

To bring a successful negligence claim, the plaintiff must establish each of the following elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, causation.

Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 89 (Tenn. 2000). For the foregoing reasons, we hold appellee's argument that no private right of action exists for the failure to report abuse is without merit.

Westerfield was granted summary judgment by the Trial Court, because the Court found that no material facts were in dispute, and that Westerfield was entitled to judgment as a matter of law. As our Supreme Court has previously explained:

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. The moving party has the burden of proving that its motion satisfies these requirements. When the party seeking summary judgment makes a properly

supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.

Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 88-89 (Tenn. 2000)(citations omitted).

Plaintiff insists that Westerfield should not have been granted summary judgment on her claim that he was negligent for failing to report his suspicions of abuse, as required by Tenn. Code Ann. § 37-1-403. While the Trial Court found that while there was a factual dispute as to whether Westerfield accurately reported his suspicions to the investigators, Tenn. Code Ann. § 37-1-410 did not require accurate reporting, and that since he communicated with the investigators, he was entitled to good faith immunity pursuant to the statute.

Tenn. Code Ann. § 37-1-401 *et seq.* is entitled “Mandatory Child Abuse Reports”, and the stated purpose behind its enactment is to “protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists.” Tenn. Code Ann. § 37-1-402. Tenn. Code Ann. § 37-1-403 requires that “any person who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of the available information, reasonably appears to have been caused by brutality, abuse or neglect.” Thus, if Westerfield suspected child abuse, which he admits he did, he had a duty pursuant to this section to report his suspicions to investigators.

Tenn. Code Ann. § 37-1-410 states that any person who makes a report of harm required by 403 is presumed to have acted in good faith, and will not be liable in any civil or criminal

action “that is based solely upon” that person’s decision to report what he believed to be harm, that person’s belief that such a report was required by law, or the fact that a report was made. The immunity provided in the statute only attaches when a person actually reports his suspicions, not when he fails to do so. In this case, Westerfield is not being sued because he made a report of abuse, in fact, plaintiff’s claim is just the opposite, plaintiff claims that Westerfield failed to report his suspicions of abuse to the investigators, and that this failure resulted in harm to the child. Since this is a summary judgment, we must take the strongest legitimate view of the evidence in plaintiff’s favor, i.e., Westerfield suspected child abuse and failed to report same.¹

We conclude the Trial Court erred in granting Westerfield immunity under the statute, since there is a dispute of material fact as to whether Westerfield actually reported his suspicions of abuse to the investigators, and this portion of the summary judgment is vacated and the cause remanded.

Plaintiff further argues that Westerfield should not have been granted summary judgment on her malpractice claim, since plaintiff contends he violated the applicable standard of care. The Trial Court found there was no doctor/patient relationship between Westerfield and Bryanna, and that such a relationship was essential to maintain a claim for medical malpractice.

In *Kelley v. Middle Tennessee Emergency Physicians, P.C.*, 133 S.W.3d 587 (Tenn. 2004), the Supreme Court held that a doctor/patient relationship was necessary to a claim of malpractice, because in the absence of such a relationship, there would be no duty of care owed by the doctor. The Court examined the requirements for establishing a doctor/patient relationship, and held that the doctor would have to affirmatively undertake to “diagnose and/or treat” the patient or to participate in same, and that such could be done without a face-to-face meeting with the patient, and with or without charging for the service. *Id.*

In this case, there is no dispute that Westerfield was contacted by the investigators, who were seeking a “second opinion” regarding Bryanna’s injuries and whether they were indicative of child abuse. Thus, Westerfield was not contacted by the patient or anyone acting on her behalf, and was not contacted by another physician regarding her diagnosis or treatment. There is no question that Westerfield was only asked to opine whether the injuries looked like possible child abuse, and was not asked to diagnose or treat Bryanna, or even to participate in such treatment. Based on the undisputed facts, we conclude the Trial Court was correct in holding there was no doctor/patient relationship between Westerfield and Bryanna, and that the Trial Court properly granted summary judgment to Westerfield on the malpractice claim.

CONCLUSION

¹ The only cases which have granted immunity pursuant to Tenn. Code Ann. § 37-1-410 are those where the abuse was actually reported. See *Leedom v. Bell*, 1997 WL 671918 (Tenn. Ct. App. Oct. 29, 1997); *Bryant-Bruce v. Vanderbilt*, 974 F. Supp. 1127 (M.D. Tenn. 1997).

Summary judgment was properly granted on plaintiff's claim for malpractice. Summary Judgment was improperly granted on plaintiff's negligence claim based on Westerfield's duty to report the abuse, and the Judgment is vacated on this issue and the cause remanded for further proceedings consistent with this Opinion.

The cost of the cause is assessed one-half to Angela Draper and one-half to Dr. Larry Westerfield.

HERSCHEL PICKENS FRANKS, P.J.